

PAY-OUT OF ACCUMULATED LEAVE PROBLEMATIC

Recent press reports concerning the pay-out of accumulated annual leave to employees caused a sensation. Reports indicated that employees may now accumulate leave indefinitely and may claim all outstanding leave upon termination of service.

A sober look at the Labour Court finding which was the cause of the consternation (*Jardine v Tongaat-Hulett Sugar Ltd [2003] 7 BLLR 717 (LC)*) however shows that the issue was taken out of context and sensationalised. In addition, the finding contradicts a well-argued finding by another judge in die same court in the case of *Jooste v Kohler Packaging Ltd (Unreported C 176/00)*.

The court's finding in the Jardine case is fairly cryptic and sometimes difficult to follow, as is often the case when a finding revolves around the unique facts of the case in question. Nonetheless, it confirms the general viewpoint that the provisions of the Basic Conditions of Employment Act on leave do not apply to leave that exceeds the statutory minimum number of days. It furthermore maintains the general principle that employers must follow their own rules on leave if they grant more leave than the statutory minimum number of days. It is precisely the employer's failure to do this that won Jardine his case.

Where the finding however differs drastically from the Jooste case, is on the question whether statutory leave that has not been used in a specific cycle is forfeited. According to the court in the Jardine case, this cannot happen. The Jooste case however finds that such leave is indeed forfeited.

The facts of the Jardine case were very specific. Jardine was dismissed for sound reasons after he was suspended with pay for a period. At that stage, he had 48 days' accumulated leave. The employer granted more leave than the statutory minimum, but also had a rule that a maximum of 40 days may be accumulated. Line management furthermore had the responsibility of ensuring that leave was not accumulated beyond 40 days. In other words, they had to make sure that the leave was taken. This rule, which formed part of Jardine's employment contract, was however subject to exceptions. If good reasons could be offered by line management why leave was not taken, all accumulated leave could be paid upon discretion, even if it exceeded 40 days. In Jardine's case, no reasons could be offered by line management why he did not take his leave, nor were any reasons offered why management didn't exercise their discretion to pay out the remaining 8 days to him. The end result was that the court ordered that Jardine's full accumulated leave had to be paid out.

Insofar as the finding is based on the non-compliance by the employer with its own leave rules, it can hardly be faulted. To the extent that it is based on the supposition that statutory leave can be accumulated, it can however not be supported. In this regard, the view of the court in Jooste's case on this point was more convincingly argued and based on supporting authority in each case, as opposed to that in the Jardine case.

What are employers to do? In view of contradicting findings and to avoid all uncertainty, it is advisable that employers who grant only the minimum statutory number of days must ensure that leave is taken within six months after the end of the leave cycle. Where more days are granted, the use and forfeiting of the additional days must be spelt out in a contract with the employee, either upon employment or thereafter. Where provision is made for forfeiting of leave, any discretion held by management in this regard should be exercised in a fair and proper manner.